SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 966.

THE UNITED STATES, APPELLANT,

vs.

CHARLES B. MASON, EXECUTOR OF THE ESTATE OF THOMAS MASON, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

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27707—12

1 In the United States Court of Claims.

THOMAS MASON
vs.
THE UNITED STATES. } No. 30750.

I. *Petition.*

Filed August 12, 1910.

The petition of Thomas Mason respectfully shows unto the court that he is a citizen of the United States, resident in the State of New Jersey, and that he is a captain on the permanent waiting orders list in the United States Revenue-Cutter Service.

That on May 3, 1895, your petitioner was placed on the retired list in said service as a lieutenant on half active duty pay, under the provisions of an act approved March 2, 1895 (28 Stats., 920), which pay was by act of April 12, 1902 (32 Stats., 101), increased to three-fourth of the active duty pay of said rank.

That under the provisions of an act approved February 25, 1905, the President nominated and the Senate confirmed the appointment of your petitioner to be a captain on the permanent waiting orders list of said service in recognition of "meritorious acts whilst he was in the service of the Navy and in the Revenue-Cutter Service" as is recited in his commission, a copy of which is annexed hereto. "Exhibit A."

That your petitioner under said commission received and held and enjoyed his said advancement in rank; and from that date to
2 the present has been borne upon the official register of said Revenue-Cutter Service as captain retired.

That whilst enjoying said rank the Congress in an act approved on April 16, 1908, entitled "An act to increase th' efficiency of the personnel of the Revenue-Cutter Service," provided as follows:

"SECTION 5. That any officer of the Revenue-Cutter Service with a creditable record who served in the Civil War in the land or naval forces of the United States, shall, when retired, have the rank and receive three-fourths the duty pay and increase of the next higher grade, and the provisions of this section shall apply to officers of the service now on the retired list."

That the record of service of your petitioner has been and is creditable; that in the Civil War he served in the naval forces of the United States, having been as a master's mate attached to the flagship "Hartford" under Admiral Farragut, participating in the passage of the forts at the mouth of the Mississippi, and in the engagements with the rebel batteries at Vicksburg in 1861–2; that he was promoted to the rank of acting ensign, and on the U. S. S. "Seneca," on duty in the North Atlantic Squadron, he participated in both attacks upon and in the capture of Fort Fisher; and that he was honorably discharged in February, 1868.

That because of his creditable record and naval service in the Civil War he became, and was, under the provisions of said section 5 of the act of April 16, 1908, entitled to receive advancement to the rank and three-fourths of the duty pay of the next higher grade, to wit, of the grade of senior captain in the Revenue-Cutter Service, and made due application therefor, but his application was denied upon the opinion and ruling of the Comptroller of the Treas-
3 ury under his construction of the meaning of the words "grade" and "rank" as used in said section 5 of said act.

But your petitioner is credibly informed and therefore avers that in other cases, exactly analogous to the present case, to wit, in the case of Chaplain (Rear Admiral) J. J. Kane, U. S. Navy, and of Senior Captain Joseph M. Simms, U. S. Revenue-Cutter Service, those officers were held to be entitled to the increased rank and pay provided by the law for those officers who had served in the Civil War and are to-day receiving the benefit thereof; and confident as to his legal right to his advancement in rank to senior captain under the said act of April 16, 1908, your petitioner claims his said advancement and the three-fourths pay of said rank and prays judgment for the difference of pay between that of his present rank of captain and the three-fourths duty pay of the rank of senior captain, at the rate of $31.25 per month from April 16, 1908, to wit, $812.50.

And petitioner will ever pray, etc.

THOMAS MASON,
Captain, Permanent Waiting Orders List,
U. S. Revenue-Cutter Service.

Subscribed and sworn to before me this 11th day of July, 1910.
[SEAL] EDWARD E. BRUEN,
Notary Public.

F. B. P. SANDS,
Attorney for Claimant.

4 Copy.

Theodore Roosevelt, President of the United States of America, to all to whom these presents shall come, greeting:

Know ye, that reposing special trust and confidence in the integrity, diligence, and discretion of Thomas Mason, I have nominated and, by and with the advice and consent of the Senate, do appoint him in accordance with the act of Congress approved February 25, 1905, for meritorious acts while in the service of the Navy and of the Revenue-Cutter Service of the United States, a captain on the "permanent waiting orders" list in the Revenue-Cutter Service of the United States, and do authorize and empower him to execute and fulfil the duties of that office, according to law, and to have and to hold the said office with all the rights and emoluments there-

unto legally appertaining unto him, the said Thomas Mason, during the pleasure of the President of the United States for the time being. No increase of pay or allowance is to be made by the advance in grade hereby authorized.

In testimony whereof I have caused these letters to be made patent and the seal of the Treasury Department of the United States to be hereunto affixed. [SEAL.]

Given under my hand at the city of Washington, the twentieth day of March, in the year of our Lord one thousand nine hundred and five, and of the independence of the United States of America the one hundred and twenty-ninth.

(Signed) THEODORE ROOSEVELT.

By the President:

(Signed) L. M. SHAW,
Secretary of the Treasury.

5 II. *Traverse.*

Filed April 27, 1911.

In the Court of Claims of the United States, December term, A. D. 1911.

CHAS. B. MASON, EXR. OF THOMAS MASON,
vs.
THE UNITED STATES. } No. 30750.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

6 III. *Substitution of the executor.*

On January 14, 1911, the death of the claimant, Thomas Mason, being suggested, whereupon Charles B. Mason, having filed duly certified letters of administration, was ordered to be entered as the party claimant in this case.

7 IV. *Argument and submission of case.*

On the 26th day of April, 1911, this case came on to be heard. Mr. F. P. B. Sands was heard for the claimant; Mr. George M. Anderson was heard in opposition and the case was submitted.

8 V. *Amendment to petition.*

On May 11, 1911, on motion of claimant's attorney—the defendants consenting—the court allowed the following amendment to the petition to be filed, to wit:

Now comes the claimant in the above-entitled case and, leave first having been obtained from the court, files the following amendment to the petition filed in this cause on August 10, 1910:

Strike out the last words of said petition, to wit, "to wit, $812.50" and insert in lieu thereof the following words, to wit, "to the date of *of* the death of said Thomas Mason, on November 12th, 1910, to wit, the sum of $964.58."

F. P. B. SANDS,
Attorney for Claimant.

Subscribed and sworn to before me this 11th day of May, 1911.

ARCHIBALD HOPKINS, [SEAL.]
Chief Clerk.

9 VI. *Judgment dismissing petition.*

At a Court of Claims held in the city of Washington on the 29th day of May, 1911, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendant, and do order, adjudge, and decree that the petition of the claimant, Charles B. Mason, executor of estate of Thomas Mason, deceased, be, and the same is hereby, dismissed.

BY THE COURT.

10 VII. *Motion of claimant for a new trial.*

On June 12, 1911, the claimant filed a motion for a new trial, to wit:

Motion for new trial.

The claimant moves for a new trial on the ground of error of law in rendering judgment dismissing the petition.

F. P. B. SANDS,
Attorney for Claimant.

VIII. *Argument and submission of said motion.*

On November 6, 1911, the above motion came on to be heard. Mr. F. P. B. Sands was heard in support of the motion; Mr. George M. Anderson was heard in opposition, and the motion was submitted.

IX. *Order of court of December 4, 1911, on said motion.*

Claimant's motion for a new trial allowed. The former judgment dismissing the petition is vacated and set aside. The court files

findings of fact and conclusion of law and opinion and dessenting opinion as follows:

11 X. *Findings of fact and conclusion of law and opinion of the court and dissenting opinion.*

Filed December 4, 1911.

CHARLES B. MASON, EXECUTOR OF THE ESTATE OF THOMAS MASON, DECEASED, v. THE UNITED STATES.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

FINDINGS OF FACT.

I. Thomas Mason, the claimant's decedent, was a citizen of the United States, and always bore true allegiance to the Government thereof. He served with a creditable record as an officer in the United States service during the Civil War. Some time—the date unknown—after the Civil War he was appointed an officer in the Revenue-Cutter Service.

II. On May 3, 1895, while holding the rank of first lieutenant in the Revenue-Cutter Service, the claimant's decedent was retired under the provisions of the act of March 2, 1895 (28 Stat., 920), with one-half of the pay of a first lieutenant on the active list. By the passage of the act of April 12, 1902 (32 Stat., 101), his pay was increased to 75 per centum of the pay of a first lieutenant on the active list.

III. By virtue of the act of February 25, 1905 (33 Stat., 813), claimant's decedent was advanced "one grade, from first lieutenant to that of captain," with "no increase in pay or allowance by reason of such advance." On April 16, 1908 (35 Stat., 61), Congress passed an act entitled "An act to increase the efficiency of the personnel of the Revenue-Cutter Service," section 5 of which reads as follows:

"That any officer of the Revenue-Cutter Service with a creditable record who served during the Civil War in the land or naval forces of the United States shall, when retired, have the rank and receive three-fourths of the duty pay and increase of the next higher grade; and the provisions of this section shall apply to officers of the said service now on the retired list."

IV. The claim was presented to the accounting officers of the Treasury, and was disallowed by the Auditor for the Treasury Department and the Comptroller of the Treasury.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the estate of Capt. Thomas Mason, deceased, is

entitled to recover the difference of pay between the pay of
12 captain and three-fourths duty pay of senior captain, at the rate of $31.25 per month, from April 16, 1908, to September 10, 1910, a total sum of eight hundred and seventy-five dollars ($875).

OPINION.

ATKINSON, J., delivered the opinion of the court:

This case was decided May 29, 1911, adversely to the plaintiff, and it again comes before the court on a motion for a rehearing averring error of law in the judgment of the court in dismissing the petition.

The court in its opinion on the first hearing of the case (46 C. Cls., ——) made the following statement of facts, which are not disputed:

"The claimant's decedent herein served creditably throughout the Civil War in various capacities in the naval service of the United States. Subsequent to the close of said war (date not given in the record) he was appointed an officer in the Revenue-Cutter Service. On May 3, 1895, while holding the rank of first lieutenant in said service, he was retired under the provisions of the act of March 2, 1895 (28 Stats., 920), with one-half of the pay of a first lieutenant on the active list. By the passage of the act of April 12, 1902 (32 Stats., 101), his pay was increased to 75 per cent of the pay of a first lieutenant on the active list.

"By a special act of Congress approved February 25, 1905 (33 Stats., 813), claimant's decedent was advanced one grade, from first lieutenant to that of captain, with no increase in pay or allowance by reason of such advance, and on March 20, 1905, the President commisioned him a captain on the permanent waiting-orders list in the Revenue-Cutter Service.

"On April 16, 1908 (35 Stats., 61), Congress passed an act entitled 'An act to increase the efficiency of the personnel of the Revenue-Cutter Service,' section 5 of which reads as follows:

"'That any officer of the Revenue-Cutter Service with a creditable record, who served during the Civil War in the land or naval forces of the United States, shall, when retired, have the rank and receive three-fourths of the duty pay and increase of the next higher grade; and the provisions of this section shall apply to officers of the said service now on the retired list.'

"Under the provisions of the above general act claimant's decedent requested the Navy Department to allow him the rank and three-fourths of a senior captain's pay on the retired list. The auditor for said department rejected the request, and on appeal to the Comptroller of the Treasury Department the action of the auditor was approved.

"The question to be determined is whether the Congress intended by the act of April 16, 1908 (supra), that claimant's decedent should have the rank and receive three-fourths of the duty pay and increase of the grade of senior captain on the retired list, that being the grade next above captain on the retired list, or whether he should have the

rank of senior captain and receive three-fourths of the duty pay and increase of the grade of a captain only. At the time of the passage of the above act claimant's decedent held the rank of captain (junior grade), but was retired as first lieutenant and was drawing the pay only of a first lieutenant, and he now contends that said act, being general in its provisions, advances him to the grade of senior captain and entitles him to three-fourths of the retired pay of that rank."

13 The contention of counsel for the United States is that the purpose of the act of Congress was to give increased pay only to those officers who were contemplating retiring from active service, and thereupon raised the question of difference between "office," "rank," and "grade," in military service, citing the case of Wood v. United States (15 C. Cls., 151), which was affirmed by the Supreme Court (107 U. S., 414). Wood was a graduate of the United States Military Academy and filled the offices of second and first lieutenants, captain, major, lieutenant colonel, and colonel in the Regular Military Establishment of the Government. He was commissioned brigadier general of volunteers October 11, 1861, and major general of volunteers January 27, 1865, and on March 13, 1865, he was brevetted brigadier general and major general in the Regular Army. September 1, 1866, he was mustered out of the volunteer service, and on June 9, 1886, he was retired by order of the President, with the full rank of major general, on account of wounds received in battle while in the line of duty. He was paid the full pay of a retired major general until the passage of the act of March 3, 1875 (18 Stats., pt. 3, 512), when his salary was reduced to the pay of a brigadier general, that being the full rank of the office held by him at the time he was wounded in battle.

Mr. Justice Blatchford, in reviewing the decision of this court in Wood's case, supra, said, on pages 416 and 417, inter alia:

"The view of that court was that, under the statutes of the United States in reference to the Army, the office of an officer of the Army and his rank are not necessarily identical; that the office has a rank attached to it, expressed by its title, when no other rank is conferred on the officer; that, the office remaining the same, the officer may have a different rank conferred on him, as a title of distinction, to fix his relative position with reference to other officers as to privilege, precedence, or command, or to determine his pay; that, by section 1274 of the Revised Statutes, the pay of officers on the retired list of the Army is determined by the rank upon which they are retired; that, by section 1094, the officers of the Army on the retired list are a part of the Army of the United States, and, therefore, no one can be upon that list who is not an officer appointed in the manner required by section 2 of Article II of the Constitution; that an officer of any grade, on the active list, thus appointed, may be retired with a different rank from that which belongs to his office, when Congress so provides; that this is not to appoint him to a new and different office, but is to transfer him to the retired list, and to change his rank,

while he holds the same office; and that in connection with this change of rank his pay may be changed. These views appear to us to be sound. Gen. Wood, holding the office of a colonel of Cavalry in the Army, his retirement with the rank of major general, under the act of 1868, did not confer on him the office of major general. He remained in the office of colonel of Cavalry, and acquired a higher rank, and higher pay, as a retired officer. Such rank not being an office, Congress could change his rank, and with it his pay, as it did by the act of 1875."

The case of Gen. Wood permanently settles the differences between office, rank, and grade of line and staff officers of the United States Army. It also determines that appointments to office in the military arm of the Government can only be made by the executive branch in the manner provided by Article II and section 2 of the
14 Constitution, and not by congressional enactment; and that the Congress may retire an officer from active service and place him on the retired list upon a rank different from that which attaches to his office by general laws, and may change the mere rank of an officer on the active or the retired list at pleasure, without conflicting with the Constitution.

But the case of Gen. Wood is not this case. Plaintiff's decedent, at the time of his retirement, held the office and the rank of first lieutenant in the Revenue-Cutter Service, Treasury Department, and was paid according to that grade and rank. On the 25th of February, 1905, by a special act of Congress the President was authorized to advance him one grade, viz, to that of junior captain on the "permanent waiting-orders" list, without increase of pay, and he was commissioned as such officer on March 20 of that year; and under the ruling of this court in Hawkins's case (40 C. Cls., 110), having been promoted to the office and rank of captain, he could not thereafter be considered as a lieutenant, nor could he again be relegated to the duties of the lower grade. All ranks and grades in this branch of the service are actual and definite, with specific duties that are permanent, and although officers may be on the retired list they are still subject to assignment to active duty, and are entitled to longevity pay the same as if in active service.

In our former opinion in this case we decided that the fifth section of the act of April 16, 1908, provided for one grade advancement for all officers who had served creditably during the Civil War in the Revenue-Cutter Service above that held by them at the time of their retirement; and as plaintiff's decedent had been advanced one grade in rank by the special act of February 25, 1905, without pay, the general act of April 16, 1908, did not apply to him except to increase his pay one grade above that which he was receiving at the time of his retirement. We are now of the opinion that a more critical examination of said act does not justify the construction we then placed upon it. The words "shall, when retired, have the rank and receive three-fourths of the duty pay and increase of the next higher grade," being unambiguous, do not relate to the rank and pay of the

officers at the time of their retirement from the service, but relate to retirements subsequent to the passage of the act. We are led to the conclusion that this was the intention of Congress by the concluding sentence of the act, which reads: "The provisions of this section shall apply to officers of the said service now on the retired list." These words recognize the status, rank, and grade of the officers as they existed at the time of the passage of the act and can not therefore be applied to the time that they retired from active service.

It is elementary that a court in construing a legislative act must give effect to every part of the same; that all words must be construed in their ordinary sense, unless the court would be led to absurdity or to manifest injustice; and if it should, so to vary them as to avoid that which certainly could not have been the intention of the legislature. In other words, the court must place a reasonable construction upon all of the words used in the act. (Chew Heong *v.* United States, 112 U. S., 536.) Therefore, to arrive at any other conclusion than we have above stated, the court would have to eliminate from the statute the concluding sentence, which would be an unauthorized invasion of the rule of statutory construction.

15 Plaintiff's decedent held the office of junior captain by a commission of the President approved by the Senate when this act was passed, and we are now of the opinion that he is entitled to the rank and pay of captain of the senior grade thereunder.

Claimant's motion for a new trial is allowed. The former judgment dismissing the petition is vacated and set aside. Findings of fact and conclusion of law are this day filed awarding claimant judgment in the sum of $875.

DISSENTING OPINION.

PEELLE, Ch. J., adheres to the conclusion reached by the court in its former opinion, and mainly for the reasons stated in the last paragraph thereof, which in substance is that under the act of April 16, 1908, officers of the Revenue-Cutter Service who served creditably during the Civil War are entitled, upon retirement, to have the rank and three-fourths of the duty pay of the next higher grade, which, in the present case, is that of captain (junior grade); that as the claimant when retired in 1895 was a first lieutenant, he would, had he so remained until the passage of the act of 1908, now be entitled thereunder to the rank and three-fourths of the duty pay of a captain (junior grade), that being the next grade above that of first lieutenant; but having reached the grade of captain (junior grade) under the special act of Congress of 1905, which also denied him increase of pay over that to which he was entitled as a retired first lieutenant, the act of 1908 operates, if at all, only to give him three-fourths of the pay of the rank next above that held by him at the time of his retirement and not to advance him to a grade beyond that given him by appointment of the President (while retired) under the special act.

The language of the act of 1908 in terms applying to officers "now on the retired list" does not mean that officers so retired when thereafter advanced in grade by appointment under a special act of Congress shall make such advanced grade the basis for the "next higher grade" under the act of 1908. The words "now on the retired list" clearly mean officers who were then on the retired list in the several grades in which they were retired. Otherwise the language to support the claimant's contention would have to be so construed as to hold that the grade to which the claimant was advanced under the special act was in effect the grade held by him when retired.

The claimant's contention, carried to its logical conclusion, means that if an officer prior to the act of 1908 was retired, say, as a first lieutenant, and had been advanced or promoted by special act of Congress to the grade of lieutenant colonel, he would be entitled, under the act of 1908, to be retired with the rank and three-fourths of the duty pay of a colonel. The mere statement carries its own answer.

I am authorized to say that Howry, J., concurs in the views above expressed.

16 XI. *Judgment of the court.*

At a Court of Claims held in the city of Washington on the fourth day of December, 1911, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the claimant, Charles B. Mason, executor of the estate of Thomas Mason, deceased, do have and recover of and from the United States the sum of eight hundred and seventy-five dollars ($875).

BY THE COURT.

17 XII. *Application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 4th day of December, 1911, in favor of claimant, the defendant, by their Attorney General, on the 9th day of January, 1911, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney General.
F. DeC. F.

Filed January 15, 1912.

Ordered: That the above appeal be allowed a' prayed for.

BY THE COURT.

JANUARY 15, 1912.

18 Court of Claims.

CHARLES B. MASON, EXECUTOR OF THE estate of Thomas Mason, dec. *vs.* THE UNITED STATES.	No. 30750.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the orders and findings of fact and conclusion of law filed by the court; of the opinion of the court and dissenting opinion; of the final judgment of the court; of the application of the defendants for an appeal to the Supreme Court of the United States and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 31 day of January, 1912.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

(Indorsement on cover:) File No. 23042. Court of Claims. Term No. 966. The United States, appellant, vs. Charles B. Mason, executor of the estate of Thomas Mason, deceased. Filed February 3d, 1912. File No., 23042.

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In the Supreme Court of the United States.

OCTOBER TERM 1912.

THE UNITED STATES, APPELLANT,
v.
CHARLES B. MASON, EXECUTOR OF THE estate of Thomas Mason, deceased. } No. 537.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was brought in the Court of Claims by the deceased, Thomas Mason, an officer on the retired list of the Revenue-Cutter Service, for the difference in pay between the retired pay of a captain, junior grade, and a captain, senior grade, from April 16, 1908, the date of the act advancing the rank and pay of retired officers one grade, to September 10, 1910, the date of the death of the original claimant.

Thomas Mason served in the Navy of the United States, with a creditable record, during the Civil War. Some time after the close of that war, the date not shown by the record, he received an appointment as

an officer in the Revenue-Cutter Service of the United States. On May 3, 1895, while holding the office of first lieutenant in that service, he was retired under the provisions of the act of March 2, 1895 (28 Stat., 920), with one-half of the pay of a first lieutenant on the active list. By the act of February 25, 1905 (33 Stat., 813), he was advanced to the rank of captain, junior grade, with "no increase in pay or allowance by reason of such advance," for meritorious conduct in the Navy of the United States during the Civil War.

On April 16, 1908 (35 Stat., 61), Congress passed an act entitled "An act to increase the efficiency of the personnel of the Revenue-Cutter Service," section 5 of which provided that officers of the Revenue-Cutter Service who had served in the land or naval forces of the United States with a creditable record, during the Civil War, should upon retirement receive three-fourths of the duty pay and increase of the next higher grade, and made the provisions of the section applicable to officers then on the retired list. After the passage of this act the claim was presented to the accounting officers of the Treasury, and was disallowed by the Auditor for the Treasury Department and the Comptroller of the Treasury. (Rec., p. 5.)

On August 12, 1910, suit was brought in the Court of Claims by the deceased (Rec., pp. 1 and 2), and after his death Charles B. Mason was appointed as the executor of his estate, and upon a hearing by the Court of Claims the petition was dismissed with an opinion by the court (Rec., p. 4; 46 C. Cls., 393).

On June 12, 1911, appellee filed a motion for a new trial, and on December 4, 1911, the motion was allowed, the former judgment vacated, and a new judgment rendered in favor of the executor for $875, from which judgment the defendants appeal to this court (Rec., pp. 4 and 5).

QUESTIONS OF LAW INVOLVED.

(1) The appellee contends that the act of April 16, 1908, *supra*, operated to advance the honorary rank of the deceased, Thomas Mason, one grade and his pay two grades, so that he should have held the rank of captain, senior grade, and drawn three-fourths of the active duty pay of that grade.

(2) The Government contends that the act of April 16, 1908, *supra*, was intended to operate upon the grade in which the deceased was retired from active duty, so as to give him seventy-five per centum of the active duty pay of a captain, junior grade, and leave his rank unaffected.

ARGUMENT.

Thomas Mason was retired with the rank and one-half of the active duty pay of a first lieutenant in the Revenue-Cutter Service of the United States. His pay was afterwards increased to seventy-five per centum of the active duty pay of a first lieutenant by section 9 of the act of April 12, 1902 (32 Stat., 101), which declares:

> That all officers borne upon the retired or permanent waiting orders list at the date of the passage of this act, or hereafter, shall receive

> seventy-five per centum of the duty pay, salary, and increase *of the rank upon which they have been or may be retired: Provided,* That no longevity increase of pay shall be allowed for any length of service accruing after retirement. [Italics ours.]

Under the limitations of this act, if an officer's rank and pay had been advanced after retirement he would have received only seventy-five per centum of the pay of the grade upon which he had been retired. The act is clear upon this point, and it is also equally clear that length of time *upon the retired list* furnishes no grounds for increase in pay.

At this point it may be very naturally asked, Has Congress by subsequent legislation removed the limitations of this act? This question should be answered by an examination of the subsequent legislation of Congress affecting the status of the appellee's decedent.

By the act of February 25, 1905, *supra*, Thomas Mason was given the *honorary rank* of captain, junior grade, "for meritorious acts while in the service of the Navy and of the Revenue-Cutter Service of the United States," but the act also provided "that no increased pay or allowance is to be made by the advance in grade hereby authorized." The language of the act is quite clear that the *honorary rank* conferred by Congress should not be made the basis for an increase in pay, the only desire of the veteran officer being to receive the title of

captain before his death, which occurred about two years and a half afterwards. (S. Rep. 1924, 58th Cong., 2d sess.; Cong. Rec., vol. 39, pt. 3, pp. 2845, 2847.)

The act of February 25, 1905, *supra*, is in perfect harmony with the act of April 12, 1902, *supra*, and they should be construed together.

The act under which this suit was brought, and which is now before the court for construction, is section 5 of the act of April 16, 1908, *supra*, which declares:

> That any officer of the Revenue-Cutter Service with a creditable record who served during the Civil War in the land or naval forces of the United States shall, when retired, have the rank and receive three-fourths of the duty pay and increase of the next higher grade; and the provisions of this section shall apply to officers of the said service now on the retired list.

It is really under the last provision of the act, "this section shall apply to officers of the said service now on the retired list" that the claim has been made that the rank of the deceased officer should have been advanced to captain, senior grade, and his pay increased to seventy-five per centum of the active-duty pay of that grade.

The act unquestionably related primarily to officers still in the active service of the United States, and the manner of its application to officers on the retired list should have been governed by the laws in

force regulating the pay of retired officers. This case was governed by section 9 of the act of April 12, 1902, *supra*, which declares that officers of the Revenue-Cutter Service on the retired list at the time of the passage of the act shall receive their increase of pay upon the rank upon which they had been retired. The two acts are *in pari materia* and should be read together.

That the intent of Congress in passing the act of April 16, 1908, *supra*, was to ignore honorary titles of rank, conferred for distinguished or meritorious service, is clearly shown by the following extract from the report of the Senate Committee on Commerce on the bill before it became a law:

> Section 5 provides that officers of the Revenue-Cutter Service who served with the forces of the United States during the Civil War shall, upon retirement, be retired as of the next higher grade, as is provided for officers of the Army, Navy, and Marine Corps.
>
> (For Army, see act approved April 23, 1904; for Navy, see act approved March 3, 1899; for Marine Corps, see act approved April 27, 1904.)

This extract from the Senate report was adopted by the Committee on Interstate and Foreign Commerce of the House of Representatives in its report on the bill. (S. Rep. 58; H. Rep. 1057, 60th Cong., 1st sess.)

The object of the bill was explained in detail on the floor of the House by the chairman of the committee, in answer to several questions, and we take the liberty

of quoting both the questions and answers upon the authority of the case of *Binns* v. *United States* (194 U. S., 486–496):

> Mr. MANN. Section 5 of the bill places the officers now on the retired list who had served in the Civil War on retired pay on the basis of the next higher grade, in the same way as has been applied to the Army and Navy.
>
> Mr. UNDERWOOD. What I want to know is on what basis are they retired now. Are they receiving any retired pay now?
>
> Mr. MANN. They receive now three-fourths pay. It does not increase the amount of pay except as it increases the rank upon which they are retired one grade, and of course to that extent increases the pay. These men are all now on the retired list on three-fourths pay under existing legislation.
>
> Mr. UNDERWOOD. And the bill promotes them a grade since they retired.
>
> Mr. MANN. That is true.
>
> Mr. UNDERWOOD. And gives them the pay for the promoted grade.
>
> Mr. MANN. That is true; and I will be very frank with the gentleman about it, as I always endeavor to be with the House. I think that feature of the bill to some degree is objectionable. I certainly would not have been willing to have it reported into the House if it were an original proposition, but the House having accepted, against the vote of myself and probably of the gentleman from Alabama (Mr. Underwood), the principle of retired pay in the Revenue-Cutter Service, and having put

> that service upon the same basis as the Army and Navy as to the principle of retired pay, I see no reason for making a distinction between the officers of the Revenue-Cutter Service who had Civil War service and those officers in the Army and Navy who had Civil War service, and that proposition has already been applied to them in the Army and Navy.
>
> (Cong. Rec., 60th Cong., 1st sess., vol. 42, pt. 5, p. 4557.)

The act of April 23, 1904, providing for the promotion of officers on the retired list of the Army who served with credit during the Civil War, with increased pay, referred to in the Senate report quoted above, contains the following proviso (33 Stat., 264):

> That this act shall not apply to any officer who received an advance of grade since the date of his retirement or who has been restored to the Army and placed on the retired list by virtue of the provisions of a special act of Congress.

The Navy personnel act of March 3, 1899 (30 Stat., 1004), also referred to in the report, placed officers of the Navy and the Marine Corps on exactly the same footing as to pay as officers of corresponding rank in the Army, and therefore the proviso to which we have just referred was not necessary in order to fix the status of retired officers who had served with credit during the Civil War in the Navy or Marine Corps; but subsequently to the passage of the Navy personnel act the identical proviso was enacted in the act of June 29, 1906 (34 Stat., 554), in the para-

graphs making provision for the promotion in rank and pay of officers of the Navy and Marine Corps who had served with credit as officers or enlisted men during the Civil War, upon retirement.

The declaration of the proviso that the act of April 23, 1904, *supra*, shall not apply to officers who had been advanced in grade since retirement was evidently intended to apply to cases only where both pay and rank had been advanced since retirement. Any other construction would appear to us unreasonable. But where an officer had been advanced in rank after retirement, but not in pay, his increased pay should be in the rank upon which he had been retired, and this rule should apply to officers on the retired list of the Revenue-Cutter Service; otherwise they would be a law unto themselves.

The reports of the committees of Congress to which we have referred show that the Secretary of the Treasury was largely responsible for the introduction of the bill which became the act of April 16, 1908, which alone, coupled with the fact that the accounting officers of the Treasury were called upon to administer the law, should entitle the construction of the auditor and the comptroller in disallowing the claim to great respect. (*Brown* v. *United States*, 113 U. S. 568.)

When the court below had the case under consideration, it is only fair to state that it did not have before it the reports of the committees of Congress upon the bill which afterwards became the act of April 16, 1908, *supra*, connecting that act with the Army, Navy, and Marine Corps acts, advancing the

grades of officers who had served with credit during the Civil War upon retirement. Nevertheless, it reached the proper conclusion in dismissing the petition, as shown by an extract from its opinion:

> We do not agree with this contention of claimant's counsel. The fifth section of the act of April 16, 1908 (*supra*), in plain terms provides that all officers of the Revenue-Cutter Service who served creditably during the Civil War may be advanced one grade in rank and pay above the rank held by them *at the time of their retirement.* Claimant's decedent was retired as a first lieutenant, and as the section referred to includes officers on the retired list, under its provisions he would be entitled to be advanced to the rank and pay of a retired junior captain. But subsequent to his retirement he was, by the special act of Congress of February 25, 1905 (*supra*), advanced to the rank of junior captain, which was one grade above the rank held by him at the time of his retirement. Consequently he does not come within the provisions of the act of 1908, for the reason, as we have above stated, that said act provides for one step of advancement in rank and pay above that held by an officer *when he was retired from the service.* Inasmuch, however, as claimant's decedent was advanced by a special act of Congress from the grade of a first lieutenant (the rank held by him at the time of his retirement) to that of junior captain, without increase of pay, he can not now be advanced to the grade and rank of senior captain under the act of 1908; but under

its provisions he was entitled to the pay of a retired officer of the rank of junior captain, which he was receiving at the time of his demise. In other words, claimant's decedent would be entitled to the pay of a junior captain from the date of the passage of said act of 1908 to the time of his death, which is all that he would have been entitled to receive thereunder had the special act of 1905 never been passed. His petition, therefore, is dismissed. (46 C. Cls. 393.)

The Court of Claims afterwards, upon a motion for a new trial, vacated its former judgment and filed a new judgment in favor of the executor. The chief justice of the Court of Claims filed a dissenting opinion, in which Judge Howry concurred, adhering to the former opinion of the court for the reasons stated in the paragraph quoted above. We think his reasons for declining to change his former opinion unanswerable:

> The language of the act of 1908 in terms applying to officers "now on the retired list" does not mean that officers so retired when thereafter advanced in grade by appointment under a special act of Congress shall make such advanced grade the basis for the "next higher grade" under the act of 1908. The words "now on the retired list" clearly mean officers who were then on the retired list in the several grades in which they were retired. Otherwise the language to support the claimant's contention would have to be so construed as to hold that the grade to which the

claimant was advanced under the special act was in effect the grade held by him when retired.

The claimant's contention, carried to its logical conclusion, means that if an officer prior to the act of 1908 was retired, say, as a first lieutenant, and had been advanced or promoted by special act of Congress to the grade of lieutenant colonel, he would be entitled, under the act of 1908, to be retired with the rank and three-fourths of the duty pay of a colonel. The mere statement carries its own answer. (Rec., pp. 9 and 10.)

CONCLUSION.

For the reasons set out in this argument, we respectfully suggest that the judgment of the Court below be reversed and the case remanded for such further action as this court may deem proper.

JOHN Q. THOMPSON,
Assistant Attorney General.
GEO. M. ANDERSON,
Attorney.

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In the
Supreme Court of the United States

THE UNITED STATES, *Appellant*,
vs.
CHARLES B. MASON, *Executor of the estate of Thomas Mason, deceased.*
No. 966.

BRIEF IN BEHALF OF APPELLEE.

The facts in this case, as set forth in the findings of fact (page 5 of Record), are briefly the following, to wit:

The claimant's decedent was a loyal citizen of the United States who served with credit in the Navy of the United States in the Civil War and afterwards as an officer in the Revenue Cutter Service. On May 3, 1895, he was retired as a Lieutenant, and, under the act of Congress, approved April 12, 1902, his pay was increased to seventy-five per centum of the pay of that rank.

Under special act approved February 25, 1905, he was promoted to be a *Captain on the retired list* of the Revenue Cutter Service. On April 16, 1908, *a general law* entitled "An act to increase the efficiency of the personnel of the Revenue Cutter Service" was enacted, the 5th Section of which provided:

> "Section 5. That any officer of the Revenue Cutter Service *with a creditable record who served in the Civil War in the land or naval forces* of the United States, shall, when retired, have the rank and receive three-fourths of the duty pay and increase of the next higher grade, *and the provisions of this Section shall apply to officers of the Service now on the retired list.*"

The claim of Captain Mason for the benefit of that provision of that law was disallowed by the Comptroller, whereupon he brought his suit in the Court of Claims to secure a judicial determination of his rights under said Section 5.

The final decision in his favor is set out on pages 5 and 6 of the record. From that decision the appeal is taken.

So logically and clearly and correctly does the opinion of the Court (on pages 8 and 9 of the Record) give its construction of that section of the law and of Captain Mason's rights thereunder, that it is difficult to see how a different conclusion can be entertained.

After expressly denying the contention now advanced by the appellant, it reads as follows:

> "The words 'shall, when retired, have the rank and receive three-fourths of the duty pay and increase of the next higher grade' *being unambiguous,* do not relate to the rank and pay of the officers at the time of their retirement from the service, but relate to retirements subsequent to the passage of the act. We are led to the conclusion that this was the intention of Congress by the concluding sentence of the Act, which reads "the

provisions of this section shall apply to officers of the said service now on the retired list." These words recognize the status, rank and grade of the officers *as they existed at the time of the passage of the Act*, and cannot therefore be applied to the time that they retired from active service.

It is elementary that a court in construing a legislative act, must give effect to every part of the same; that the words must be construed in their ordinary sense, unless the court would be led to absurdity and manifest injustice; and if it should so to vary them as to avoid that which certainly could not have been the intention of the legislature. In other words, the court must place a reasonable construction upon all the words used in the Act. (Chew Heong vs. U. S., 112 U. S., 536.) Therefore to arrive at any other conclusion than we have above stated, the court would have to eliminate from the statute the concluding sentence which would be an unauthorized invasion of the rule of statutory construction.

Plaintiff's decedent held the office of junior captain by a commission of the President approved by the Senate, when this Act was passed, and we are now of the opinion that he is entitled to the rank and pay of the senior grade thereunder."

The Contention of the Appellant is Not Sound.

The sole contention of the appellant, which seeks to support the dissenting opinion in the court below, is that:

"The words 'now on the retired list' clearly

mean officers who were *then* on the retired list in the several grades *in which they were retired.*"

In this contention we have a subtle and forced effort to read into the act language which is contradictory to the terms of the concluding sentence of the section above set out—an act which is in violation of rules of statutory construction, and is forbidden by the countless decisions of this Court.

Having thus recast the plain and simple language of the act to accord with the views of the dissenting opinion, the brief of the appellant adopts a line of argument which has never been favored by this Court.

We preface our argument in answer to this brief of the attorney for the appellant by an emphatic protest against assertions made in the statement (on page 3) as to the questions of law involved in the case, to wit, that "the appellee contends that the act of April 16, 1908, *supra,* operated to advance the *honorary* rank of the deceased Thomas Mason one grade and his pay two grades, etc." This is an error which is repeated in line 21, page 4, in the statement that "Thomas was given the *honorary rank* of Captain, junior grade," and this repeated in the 28th line of the same page.

These statements are manifestly such as are calculated to mislead the Court as to an important fact.

There is no rank of *"Captain, junior grade."*

There is no *honorary* rank in the Revenue Cutter Service. As to the line officers of said Service, the only ranks and grades, as specified in the law (see act of April 12, 1902, as amended by the act of April 16, 1908), are: one Captain, six Senior Captains, thirty-

one Captains, and other officers of lower grades. Upon reaching the age of sixty-four years the officers are placed upon "the retired waiting orders list."

The contention of the appellee, *correctly stated*, is that Thomas Mason holding at the time of the passage of the act of April 16, 1908, the *actual* rank of *Captain* on the retired waiting orders list of the Revenue Cutter Service; and, by virtue of his commission set out on page 2 of the Record, being authorized and empowered "to *execute* and *fulfil* the *duties* of *that office* according to law, and to have and hold the said office *with* all the rights and emoluments thereunto legally appertaining unto him during the pleasure of the President" was entitled to the full benefits of Section 5 of that act in the advanced rank of Senior Captain and the pay thereof.

Whilst *under the special act of Feburary* 25, 1905, he did not receive an increase of his pay whilst awaiting orders, yet, we submit, the provision of Section 6 of the act of April 12, 1902, declares, as to retired officers of that Service, that "officers thus retired *may be assigned* to such *duties* as they may be able to perform in the discretion of the Secretary of the Treasury." And had the exigencies of the Service prompted the Secretary of the Treasury to order Captain Mason to duty, he could only have so ordered him to duties that belonged to the said rank of Captain, and as Captain; and such performance of duties would, for the period of such service, be *active* service, under which the pay of the rank on the active list would have undoubtedly been received by him.

The argument of the attorney for the appellant shows that he had in mind the *honorary rank*, called "a brevet," which is known only to the military branch of the public service, for which there is no similarity or analogy in

any rank known to the Revenue Cutter Service.

Had Congress entertained the view or contention of the appellant that forms the basis of the theories advanced, assuredly it had command of language which would have so expressed that intention in unequivocal terms well known to our legislators. To illustrate: In the act of April 23, 1904, relating to the large number of Army officers with Civil War records, the language used as to their retirement was, *"With the rank and retired pay of one grade above that actually held by him at the time of his retirement."* Whereas, for the few officers of the Revenue Cutter Service to be benefited, the concluding sentence of Section 5, *supra*, was, "And the provisions of this section shall apply to officers of the said Service now on the retired list," and this language, wholly different from that used in the Army act above cited, shows the intent to be also different, being clear and unambiguous, and Mason being at that time a Captain "on the retired list" is clearly entitled to the benefits of the advanced rank and its pay as awarded by the section to officers in that Service who had served with credit during the Civil War in the Naval service.

To contend otherwise would be seeking *"by subtle and forced construction"* to limit the operation of the act itself.

We respectfully submit that in construing the simple provisions of Section 5 of the act of April 16, 1908, the construction given to other laws, wholly different in language, is not to be considered, but that the liberality of Congress towards the very few officers of the Cutter Service who were in the Civil War is to be sustained by an intelligent and fair method of reasoning that will make the provision of the law effectual rather than to nullify and defeat its manifest purpose and intent.

The citations in the appellant's brief (10-11 pages) from the first (and erroneous) opinion of the court below, show, in the italicized phrases, "at the time of their retirement" and "when he was retired from the Service," the grave error of that Court at that time in forcing into the law language contradictory to its plain terms, to give it a meaning not intended by Congress; an error that was promptly corrected by the majority of the Court in its final decision (from which we have hereinbefore quoted) on the appellee's motion, under which that violation of the causes of construction was demonstrated.

The dissenting opinion had other laws in its mind, and, we respectfully submit, did not hold to the simple judicial duty of construing the section of the law under which the appellee rested his rights.

We have read with care the argument made in appellant's brief, but fail to see that with any fair reasoning from the premises presented any logical conclusion such as it suggested that the words in the 5th Section of the act of April 16, 1908, to wit, "now on the retired list," can be made to mean "in the several grades in which they were retired," as interpreted by the attorney of the appellant. These words more naturally and obviously mean "in the grades in which they *now* stand on the retired list," for that is clearly what was meant and is consistent with the whole text of the said section and the purpose thereof.

The Correct Rule of Construction.

We respectfully submit that in construing this Section 5 of the act of April 16, 1908, the court below had to conform to the just and reasonable rules laid down by

this Court. We quote from two decisions only, which, however, have been cited with approval by a long line of other cases. In the case, U. S. vs. Temple, 105 U. S., 97, this Court held as follows:

> "A statute should be read according to the natural and obvious import of its language *without resorting to subtle and forced construction* for the purpose of either *limiting* or extending its operation; and, when the language is plain, *words* or *phrases* should not be inserted so as to incorporate in the statute a new and distinct provision."

In the case of Chew Heong vs. U. S., 112 U. S., 536, this Court says:

> "Courts uniformly refuse to give to statutes a *retrospective* operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

Upon the justice of those decisions, we rely in asking this Court to give what we believe to be a fair construction of the law in question that will sustain the liberality intended by Congress to be awarded to few officers of this Service who served in the Civil War. The contention now set up by the appellant is at variance with the reasoning and conclusions of the court below in U. S. vs. Hawkins (40 Ct. Cl., 110), wherein the Court unanimously held that it should always sustain a liberal construction of such statutes.

Hawkins was an Assistant Surgeon of the Indiana Militia, holding the rank of *Captain* under the State law. Congress, by an act, assured such officers that, if they with their regiments enlisted in the United States forces for the Civil War, they would have the corresponding rank and pay. After so being induced to enter the Government Service, it was contended that *under the general laws* Assistant Surgeons could only receive the rank and pay of *Lieutenant*, and Hawkins had to seek his remedy in Court.

It was held that good faith demanded that he be awarded the pay and rank of *Captain* as provided by the special act under which he was persuaded to enter the United States Service.

So, in the case at bar, Mason having under special act received the commission of Captain, which he *held* at the date of the passage of the act of April 16, 1908, and having served creditably in the Naval forces in the Civil War, and still *being a Captain* on the retired list at that date, is, because of those facts, one of the beneficiaries of the generosity of Congress towards those few officers of the Revenue Cutter Service who had so served in the Civil War, and this we submit is the clear undoubted intention of Congress.

Not to recognize this status would nullify the special act of Congress upon which Captain Mason held his commission, as set out on page 8 of the record; and assuredly this is not such action as will be favored by the Court.

In the strained effort to sustain his contention as to the intent of Congress in this act, the attorney for the appellant, on page 7 of his brief, sets out portions of the debate in the House of Representatives, justifying that method of argument by a reference to the opinion of this

Court in the case of Binns vs. U. S., 199 U. S., 496, which cited the case of the Church of the Holy Trinity vs. U. S., 143 U. S., 457.

We object to this line of argument as being contrary to the rules of construction laid down by this Court, which hold that "in construing an act of Congress a court is not at liberty to recur to the views of individual members in debate, nor consider the motives which influenced them to vote for or against its passage."

Aldridge vs. Wilhain, 3 How., 9;
U. S. vs. U. P. R. C., 91 U. S., 72;
Dist. of Col. vs. Market Co., 108 U. S., 243; and numerous other cases.

We deny the application of those decisions so cited in appellant's brief to the case at bar which concerns only the construction to be given to the language of Section 5 of the act of April 16, 1908, language which is simple, concise and intelligible only in one way to anyone who reads it, admitting of *no doubt whatever* as to the intent of Congress.

The *justification* for seeking information from sources outside of the language of the law, under consideration *in those cited cases,* arose from the necessity of seeking light as to the intent of Congress in a law *in each case,* the *constitutionality* of which was at issue. In the first case the conditions as to the liquor traffic in Alaska had to be ascertained to enable the Court to ascertain the necessities under which the license law was enacted, and in the other case the application of the "alien labor" laws to the bringing into this country of alien ministers of the Gospel presented a case involving grave doubts as to the meaning and scope of the act.

It will be seen, however, at a glance, that in the case

at bar there is no such necessity for the Court to look outside of the language of the law to interpret its meaning since it is clear and unambiguous.

If such outside references were permissible or needed to enlighten this Court, we could with greater propriety invite the attention of the Court to the Official Register of the Revenue Cutter Service for 1908, which must have been before the Congressional Committee which framed the bill; in which Register it appears that the only reference to the appellee's decedent was as to *"Captain* Thomas Mason, appointed February 25, 1905," as is mentioned in finding No. 3 (page 5 of Record) of the court below in this case.

That was the rank held by Thomas Mason *at the time of the passage of the act,* an advance of one grade above which was given by the act of April 16, 1908.

We maintain that the language of debate between two members of the *lower* House of Congress is no guide for interpreting the intention of *both* Houses of Congress whose expressed intention is clear from the simple language of the act which is unambiguous in its terms.

The brief of appellant (page 3) sets out a provision from the act of April 12, 1902, to weave into its argument, but very inaptly, we think, since that was a provision relating, as its terms declare, to the ordinary status *of all of the* retired officers of that Service *"at that time";* whereas the sole object of Section 5 of the act of April 16, 1908, was to make a special recognition of those few officers of that Service who had participated in the Civil War, and therefore the Congress was liberal in bestowing its reward for that service and in declaring who were to be entitled to its benefits.

To show that we are correct in our contention, which

the decision of the court below confirms, we call attention to another recognized rule of construction which holds that:

> "Contemporaneous construction of a statute by those charged with its execution, should not be disregarded unless for cogent reasons."
>
> U. S. vs. Moore, 95 U. S., 460;
> Heath vs. Wallace, 138 U. S., 573;
> U. S. vs. Johnston, 124 U. S., 226; and other cases too numerous to mention.

In the only other cases in which such construction was asked for of this Section 5 of the act of April 16, 1908, that we can find, those of Captain Simms, U. S. R. C. S., and that of Chaplain Kane (Rear Admiral, U. S. Navy) are set out on page 2 of the Record.

Those cases were exactly analogous as to every fact and change of rank by special acts prior to passage of the act of April 16, 1908, and those officers under the just construction for which we contend in behalf of Captain Mason received and still enjoy the advancements in rank and pay provided for by the 15th Section of the act, and to deny the same rights to Captain Mason would be a discrimination against him for which no reason can be advanced.

We therefore respectfully submit that the final decision of the court below, being in accord with the clear meaning and intention of the act and with the construction given by the Executive Department in all other cases, should be sustained in behalf of Captain Mason, the only officer eligible to the benefits of that law that remained to be acted on, and the judgment below should be affirmed.

Respectfully submitted,

F. B. SANDS,
Attorney for the Appellee.

UNITED STATES *v.* MASON, EXECUTOR.

APPEAL FROM THE COURT OF CLAIMS.

No. 537. Submitted December 20, 1912.—Decided February 24, 1913.

Section 5 of the act of April 16, 1908, 35 Stat. 61, c. 345, providing for rank and pay of retired officers of the Revenue-Cutter Service *held* not to give in this case an additional step forward to a retired officer who had already been advanced one step gratuitously.

The court in this case follows the construction of the statute by the officers of the Treasury Department.

46 Ct. Cl. 393, reversed.

THE facts, which involve the construction of the act of April 16, 1908, and the amount of pay due thereunder to an officer in the Revenue-Cutter Service, are stated in the opinion.

Mr. Assistant Attorney General John Q. Thompson and *Mr. George M. Anderson* for the United States.

Mr. Francis P. B. Sands for appellee.

Memorandum opinion, by direction of the court, by MR. JUSTICE LURTON.

This is an appeal from a judgment of the Court of Claims allowing the executor of the late Captain Thomas Mason the difference between his pay as retired Junior Captain in the Revenue-Cutter Service and the pay of a Senior Captain in the same service, for the time between the passage of the act of April 16, 1908, 35 Stat. 61, c. 145, and his death, September 10, 1910.

The provision of the fifth section of the act referred to is in these words:

"That any officer of the Revenue-Cutter Service with a creditable record who served during the civil war in the land or naval forces of the United States shall, when retired, have the rank and receive three-fourths of the duty pay and increase of the next higher grade; and the provisions of this section shall apply to officers of the said Service now on the retired list."

Mason had served with credit during the Civil War in the naval service of the United States. He was therefore within the provision of the section set out, and the only question is whether under that provision his advance in grade and in pay is to be made upon the grade he held when he was retired or upon the grade and pay he had when this act was approved.

He had been retired as of May 3, 1895, while holding the rank of First Lieutenant in the Revenue-Cutter Service, with one-half of the pay of a First Lieutenant on the active list, under the act of March 2, 1895, 28 Stat. 910, 920, c. 189. By the act of April 12, 1902, § 9, 32 Stat. 100, 101, c. 501, he and all other officers upon the retired or permanent waiting list, were given seventy-five per cent. of the duty pay of the rank they had when retired. By a special act of February 25, 1905, 33 Stat. 813, c. 796, he was advanced "one grade from first lieu-

tenant to that of captain," for meritorious acts while in the service of the navy and of the Revenue-Cutter Service of the United States, but with no increase in pay by the advance in grade thereby authorized.

The only trouble about the meaning of the act arises out of the exceptional fact that the decedent had after his retirement been advanced one grade in rank but without any advance in pay by reason of that advancement. The act obviously meant to provide that every Revenue-Cutter officer then on the active list should upon retirement advance one step in grade with three-fourths of the duty pay of the advanced grade. The same benefit was also extended to officers already on the retired list. But in both cases the advance in grade is to be based upon that held at the date of retirement with three-fourths of the pay of the advanced grade.

The claim that the decedent's advance in grade and pay is to be upon the grade to which he had been advanced without additional pay, is without merit. To concede it would be to conclude that Congress intended to advance him not upon the grade he had at retirement but upon the gratuitous advancement, and that Congress purposed to advance him one other step over that which he had at retirement and two steps in pay. The basis of the gratuity of Congress was the grade and pay at retirement. This was the construction placed upon the act by the Auditor of the Treasury Department and the Comptroller of the Treasury.

Judgment reversed and case remanded with direction to dismiss the petition.